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In the
Supreme Court of the United States
October Term, 1993

ARTHUR CALDERON, WARDEN
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Petitioner,

v.

KENNETH CLAIR,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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30 pp

QUESTIONS PRESENTED

Does a federal district court possess jurisdiction to grant a stay of execution under either 28 U.S.C. § 2251, or 28 U.S.C. § 1651(a), based solely on a request for appointment of counsel which expressed no more than an intention to file a petition for writ of habeas corpus?

Does Local Civil Rule 26.8.7, which authorizes a temporary stay of execution pending appointment of counsel, violate the Separation of Powers Doctrine?

May a district court disregard the fact that an application for extension of a stay of execution was made by one with no legal authority to do so?

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v.

KENNETH CLAIR,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

Petitioners, Arthur Calderon, Warden, California State Prison at San Quentin, California, and Daniel E. Lungren, Attorney General of the State of California, hereby respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit filed on December 30, 1993. That order determined that petitioners' appeals from orders staying execution of a state death judgment were moot.

OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals for the Ninth Circuit, which dismissed the appeals as moot, is unpublished. (App., *infra*, 2a.)

The opinion of the United States District Court for the Central District of California, which denied petitioner's motion to vacate the stay, is reported at *Clair v. Vasquez*, 827 F.Supp. 1465 (C.D. Cal. 1993). (App., *infra*, 9a-14a.)

The orders of the United States District Court for the Central District of California, which stay execution of the State death judgment, are unpublished. (App., *infra*, 3a-8a, 15a-23a.)

The opinion of the United States Court of Appeals for the Ninth Circuit, which controls this case, is reported at *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991), *cert. den.* ___ U.S. ___, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992). (App., *infra*, 29a-42a.)

JURISDICTION

The court of appeals entered its order dismissing the appeals as moot on December 30, 1993. (App., *infra*, 2a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND LOCAL COURT RULES INVOLVED

Title 28, United States Code, section 2251, states as follows:

> "A justice or judge of the United States before whom a habeas corpus proceeding is pending may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding."

Local Civil Rule 26.8.7 of the United States District Court for the Central District of California states as follows:

> "(a) Stay Pending Final Disposition: Upon the filing of a habeas corpus petition, unless the petition is patently frivolous, the district court shall issue a stay of execution pending the final disposition of the matter.
>
> "(b) Temporary Stay for Appointment of Counsel: Where counsel in state court proceedings withdraws at the conclusion of the state court proceedings or is otherwise not available or qualified to proceed, the selection panel will designate any attorney from the panel who will assist an indigent petitioner in filing pro se applications for appointment of counsel and for temporary stay of execution. Upon the filing of this application the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay shall remain in effect for forty-five (45) days unless extended by the court."[1/]

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[1] It should be noted that the other district courts in California have adopted a virtually identical local rule. *Compare* U.S. Dist. Ct. (E.D. Cal.), L.R. 191(h)(1); U.S. Dist. Ct. (S.D. Cal.), L.R. 9.3(b)(8); *and* U.S. Dist. Ct. (N.D. Cal.), L.R. 296-8(b).

STATEMENT OF THE CASE

A. Proceedings in the State Courts

Clair was convicted of murdering Linda Faye Rogers, a live-in baby sitter, while he burglarized a Santa Ana, California, residence and, consequently, was sentenced to death. On direct appeal, the conviction was affirmed by the Supreme Court of California. *People v. Clair*, 2 Cal.4th 629, 7 Cal.Rptr.2d 564, 828 P.2d 705 (1992).[2] A petition for writ of certiorari, challenging the affirmance of the judgment on direct appeal, was denied by this Court on January 11, 1993. *Clair v. California*, ___ U.S.___, 113 S.Ct. 1006, 122 L.Ed.2d 155 (1993). On February 19, 1993, the Superior Court of the State of California in and for the County of Orange ordered Clair be executed on April 13, 1993.

B. Proceedings in the District Court

On or about February 22, 1993, Clair, *in pro per*, caused to be filed in the United States District Court for the Central District of California a request for appointment of counsel and stay of execution. (App., *infra*, 24a-27a.) Clair stated in his request that he intended to file a petition for writ of habeas corpus and to allege federal constitutional errors in his petition, but his request for appointment of counsel and for a stay of execution contained no such allegations. (App., *infra*, 24a-27a.) On March 2, 1993, citing Local Rule 26.8.7(b), the district

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[2] In an unpublished order, the Supreme Court of California also denied a petition for writ of habeas corpus. *In re Clair On Habeas Corpus*, No. S024707, order filed on February 28, 1992.) Subsequently, a petition for rehearing of appellant's direct appeal was denied. *People v. Clair*, No. S004789, order filed on June 24, 1992.

court ordered a stay of execution for forty-five (45) days to and including May 28, 1993. (App., *infra*, 22a-23a.) A timely notice of appeal was filed.

On or about May 25, 1993, Attorney Michael G. Millman caused to be filed in the U.S. District Court for the Central District of California an Application for Stay of Execution, as well as other related applications.(App., *infra*, 19a-21a.)[3] On May 27, 1993, citing Local Rule 26.8.7(b), the district court extended the stay of execution for an additional forty-five (45) days to and including August 11, 1993. (App., *infra*, 17a-18a.)

On July 23, 1993, in a published order the district court denied petitioner's motion to vacate the stay of execution. *Clair v. Vasquez*, 827 F.Supp. 1465 (C.D. Cal. 1993). (App., *infra*, 9a-14a.)[4] A timely notice of appeal was filed.

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[3] Millman is a California attorney employed by California Appellate Project, a San Francisco based organization which provides appellate counsel in California capital cases. Millman also is a member of the bar of the U.S. District Court for the Central District of California. Millman stated in his application that he was acting as a member of the Selection Board for the United States District Court for the Central District of California and was "acting on behalf of" Clair. (App., *infra*, 19a-21a.)

[4] On July 12, 1993, a further 30-day extension of the stay was granted. (App., *infra*, 15a-16a) On July 22, 1993, respondent's request for appointment of counsel was granted and counsel was appointed by the district court to represent respondent concerning his federal habeas corpus challenge of his state conviction. On July 28, 1993, a further 60-day extension of the stay was granted. (App., *infra*, 7a-8a.) On October 7, 1993, a further 120-day extension of the stay of execution was granted. (App., *infra*, 5a-6a.) On November 12, 1993, the district court ordered respondent to file his petition on or before September 15, 1994, and extended the stay of execution to September 19, 1994. (App., *infra*, 3a-4a.)

C. Proceedings in the Court of Appeals

On December 30, 1993, in an unpublished order the United States Court of Appeals for the Ninth Circuit dismissed the appeals as moot. *Clair v. Vasquez*, Nos. 93-99004 & 93-99010, order filed on December 30, 1993. (App., *infra*, 2a.)

REASONS FOR GRANTING THE PETITION

The prior decision of the court of appeals in *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991), *cert. den.* ___ U.S. ___, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992), which governs this matter, is in conflict with the decision of the United States Court of Appeals for the Fifth Circuit. *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993), *cert. granted* 114 S.Ct. 544, 126 L.Ed.2d 446 (1993). Although this case presents the question presented in *McFarland*, it also presents the further question whether the local civil rule of court involved in this case violates the Separation of Powers Doctrine.

Moreover, in refusing to review the district court's determination that, although Attorney Millman had no legal authority to act on respondent's behalf when he requested an extension of the stay of execution, nevertheless it was within the district court's discretion to disregard this defect, the court of appeal has sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I. PRE-PETITION STAYS OF EXECUTION BY FEDERAL COURTS ARE NOT AUTHORIZED BY THE FEDERAL HABEAS CORPUS STATUTE.

Federal habeas corpus review of state court judgments is a statutory remedy, not a constitutional one. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT AND PROPOSAL OF THE AD HOC COMMITTEE ON FEDERAL HABEAS CORPUS IN CAPITAL CASES, at 3-4 (Aug. 23, 1989) (hereafter *Powell Committee Report*); *see also* D. Lungren & M. Krotowski, *Public Lessons from the Robert Alton Harris Case*, 40 UCLA L. Rev. 295, 300 (1992) (distinguishing three forms of habeas corpus). As this Court has aptly stated, "federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings *only in specified circumstances*. Before granting a stay, therefore, federal courts must make certain that *an adequate basis exists for the exercise of federal power.*" (Emphasis added.) *Demosthenes v. Baal*, 495 U.S. 731, 737, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990).

Disposition of the first question presented will therefore turn on whether Congress has expressly authorized federal courts to grant pre-petition stays of execution. The Ninth Circuit previously found no statutory authority but nevertheless held that the underlying purpose of the writ of habeas corpus, as reflected in Local Civil Rule 26.8.7, was sufficient to confer jurisdiction. *Brown*, 952 F.2d at 1165. More recently the Fifth Circuit held no such authority exists. *McFarland*, 7 F.3d at 49.

The federal habeas corpus statute contains only one provision concerning the authority of federal courts to stay

state court judgements. 28 U.S.C. §2251. While section 2251 does constitute an exception to the Anti-Injunction Act,[5] it does not authorize any pre-petition stay of execution. By its very terms, a stay of a state court judgment may issue only when "a habeas corpus proceeding is pending" before the district court. 28 U.S.C. § 2251.

When then may it be said that a habeas corpus proceeding is pending? The federal habeas statute defines the obligations and requirements which must be met before the federal habeas judicial process is successfully invoked. Inception of a federal habeas proceeding occurs upon the filing of an "application . . . in the form of a petition for a writ of habeas corpus." 28 U.S.C. § 2254, Rule 2(a); *see also* Advisory Committee Note to Habeas Corpus Rule 2 (1976) (specifying requirements of the actual petition). Thus, the plain meaning of the statute resolves the issue.

II. LOCAL CIVIL RULE 26.8.7, WHICH AUTHORIZES A TEMPORARY STAY OF EXECUTION PENDING APPOINTMENT OF COUNSEL, VIOLATES THE SEPARATION OF POWERS DOCTRINE.

Contrary to the plain meaning of the statute, the Ninth Circuit has held that section 2251, in conjunction with a local civil rule of court, furnishes the district court with jurisdiction to stay an execution before a federal habeas petition is filed so that a state prisoner may request appointment of counsel. *Brown*, 952 F.2d at 1165. A close examination of this automatic stay rule -- a *sine qua non* to

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[5] 28 U.S.C. § 2283.

the *Brown* rationale and holding -- shows it was adopted in violation of the Separation of Powers Doctrine.

The Separation of Powers Doctrine operates to ensure that "each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

Only Congress -- not a district court -- can enact the policy embodied by the local rule applied in *Brown* and in this case. For at least three reasons this local rule constituted "an exercise of legislative power" since it "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . all outside the Legislative Branch." *Id.* at 952.

First, the local rule alters the obligations and relations of petitioners and the State in federal habeas corpus proceedings. Under the local rule, enforcement of a final and presumptively valid state court judgment has been denied for nearly a year. [6]

Second, the local rule essentially circumscribes the long-standing congressional prohibition against federal court stays under the Anti-Injunction Act. Only Congress may accomplish this result as it has in the past. *See e.g., Mitchum v. Foster*, 407 U.S. 225, 234-235, 92 S.Ct. 2151,

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[6] It should be noted that, in *Brown*, the local rule permitted a stay of 165-days before any petition was filed. In this case, assuming no further extensions of the stay order are granted, more than 500-days will have elapsed before a petition is filed.

32 L.Ed.2d 705 (1972) (listing federal statutes qualifying under the "expressly authorized" exception to the Anti-Injunction Act).

Third, the fact that the local rule constitutes a legislative act is further demonstrated by recent attempts at federal habeas corpus reform. In the current Congress, legislation was introduced in the Senate which would have permitted a stay of execution in capital cases "upon application to any court that would have jurisdiction over a habeas corpus petition." S.1441, § 3(b), 103d Cong., 1st Sess., 139 Cong. Rec. S10,927 (Aug. 6, 1993); *see also Powell Committee Report*, at 13-16 (habeas corpus reform proposal, § 2257(a), providing for the mandatory stay of execution following the appointment of counsel after certain conditions have been met).

Clearly, "[w]ithout the challenged [local rule], this [automatic stay] could have been achieved, if at all, only by legislation." *Chadha*, 462 U.S. at 953-954. A federal court simply may not establish jurisdiction to issue pre-petition stays by a local rule when such jurisdiction does not exist pursuant to federal statute. *See Washington-Southern Co. v. Baltimore, Philadelphia S.B. Co.*, 263 U.S. 629, 635, 44 S.Ct. 220, 68 L.Ed. 480 (1924) ("no rule of court can enlarge or restrict jurisdiction"). Since 1793, Congress has specified that local rules of court "shall be consistent with Acts of Congress." 28 U.S.C. §2071(a); 12 C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE, § 3151, at 216 (1973 ed.). Since 1934, Congress has prohibited automatic stays in federal habeas cases. Act of June 19, 1934, ch. 673, 48 Stat. 1177; H.R. Rep. No. 1726, 73d Cong. 2d Sess. 1 (1934)(describing

purpose of legislation). Thus, it is clear the local rule relied upon in *Brown* and in this case violates the Separation of Powers Doctrine and must be rejected.

III. WHERE STANDING ESSENTIALLY DEFINES WHETHER THERE IS A JUSTICIABLE CASE OR CONTROVERSY, THE DISTRICT COURT MAY NOT DISREGARD THE FACT THAT AN APPLICATION FOR EXTENSION OF A STAY OF EXECUTION WAS MADE BY ONE WITH NO LEGAL AUTHORITY TO DO SO.

In this case, there also was no basis for federal jurisdiction to extend the stay of execution since the request came from Attorney Millman, rather than from Clair, or someone properly authorized to represent him. Inasmuch as the defect was jurisdictional, it was not within the district court's discretion to disregard it.

Although initially, Clair, *pro se*, had requested appointment of counsel and a stay of execution, subsequently, Attorney Millman caused to be filed an application for extension of the stay.[7] In his application, Attorney Millman said he was "acting on behalf of" Clair and as a member of the district court's Selection Board. (App., *infra*, 19a-21a.) Subsequently, the application was granted and petitioner's motion to vacate the stay was denied. *Clair v. Vasquez*, 827 F.Supp. 1465 (C.D. Cal. 1993).

In its opinion, the district court concluded that, although Millman had "no legal authority to act on [Clair's] behalf," it was "within the Court's discretion to disregard

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[7] Supra, n. 2.

this defect. (*See Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990)." *Clair*, 827 F.Supp. at 1466-1467.

The "standing" of an applicant is essential in determining whether there is a justiciable case or controversy. *Whitmore v. Arkansas*, 495 U.S. 149, 154-155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990). Assuming, as the district court found, that the applicant had no standing, may such a defect be disregarded?

To support it's conclusion that it may disregard such a defect, the district court relied upon *Hendricks*, 908 F.2d at 491. In *Hendricks*, the district court summarily dismissed a petition for writ of habeas corpus. *Id.*, at 491. Preliminarily, it was urged the district court was without jurisdiction to consider Hendrick's petition because it was not verified by Hendricks as required by law. *Id.* Recognizing that consideration of an unverified petition was permissible, the Ninth Circuit Court of Appeals concluded that lack of verification alone would not support summary dismissal where examination of the petition revealed that it did not otherwise meet the standards for summary dismissal. *Id.*

As is readily evident, the district court's reliance on *Hendricks* is misplaced. There is no reasonable comparison between failure to verify a petition and the presentation of an application by one who has no legal authority to do so. The requirement of a "case or controversy" is not merely a statutory requirement or traditional rule of practice but rather is imposed directly by the Constitution. *Whitmore*, 495 U.S. at 161; *see also Lujan v. Defenders of Wildlife*, 504 U.S. ____, 119 L.Ed.2d 351, 363-364, 112 S.Ct. 2130 (1992) (the doctrine

of standing is one of the landmarks setting apart cases and controversies that are of the justiciable sort referred to in Article III); *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 971 (1st Cir. 1993) (standing presents a threshold jurisdictional question). Thus, it was not *permissible* for Millman to apply for a stay in Clair's behalf and that fact may not simply be ignored.

Although in this case, subsequently counsel was appointed to represent Clair and the current stay of execution was sought and obtained by counsel, it needs to be made clear that a stay of execution in a capital case may be obtained only by the defendant *pro se*, or by properly appointed or retained counsel, or by a properly qualified "next friend." The district court's statement that "it would be unfair to [respondent] to set aside the stay on [the] basis" that Millman had no standing is untrue. It focused solely on fairness to Clair alone and ignored the State's right to due process. Death penalty law may be different, but not so different as to deny fundamental fairness to the society which the law is supposed to protect. Presentation of a request for a stay of execution in a capital case by one with no authority to make such a request is a jurisdictional defect which may not be disregarded.

IV. REVIEW IS NECESSARY BECAUSE OF THE SIGNIFICANCE OF THE ISSUES PRESENTED IN THE ADMINISTRATION OF THE FEDERAL HABEAS STATUTES, AS WELL AS THE SERIOUS HINDRANCE TO EFFECTIVE ADMINISTRATION OF THE LAW CAUSED BY *BROWN* AND ITS PROGENY.

There are multiple opportunities for, and potential sources of delay, in the federal habeas process. *See, e.g., Sawyer v. Whitley*, 505 U.S. ___, 112 S.Ct. 2514, 2520 n.7, 120 L.Ed.2d 269, 281 n.7 (1992) ("condemn[ing] . . . any efforts on the part of habeas petitioners to delay their filings until the last minute with a view to obtaining a stay because the district court will lack the time to give them the necessary consideration before the scheduled execution"); *In re Blodgett*, 503 U.S. ___, 112 S.Ct. 674, 116 L.Ed.2d 669 (1992) (discussing federal court delay). This case presents questions concerning pre-petition delay; that is, delay which occurs *before* a federal habeas petition has been filed.

When considering the issue of delay in federal habeas proceedings, one must remain mindful of the "secondary and limited" function of collateral review. *Barefoot v. Estelle*, 463 U.S. 880, 887, 13 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); *see also Brecht v. Abrahamson*, ___ U.S. ___, 113 S.Ct. 1710, 1719-1720, 123 L.Ed.2d 353 (1993). The collateral challenge -- while an important federal right -- is not without its costs. The enforcement of the state judgment is suspended pending final resolution of the collateral attack. *Blodgett*, 116 L.Ed.2d at 674; *see also McCleskey v. Zant*, 499 U.S. 467, 491, 111 S.Ct.

1454, 113 L.Ed.2d 517 (1991). Victims of the crime -- and their family members and friends -- cannot attain closure until there is finality. Delay also aggravates the deterrence objectives of the criminal law. *See*, L. Powell, *Commentary: Capital Punishment*, 102 Harv. L. Rev. 1035 (1989) (noting that the "years of delay between sentencing and execution . . . undermine the deterrent effect of capital punishment").

While any delay in the collateral review process levies costs on the criminal justice system, pre-petition delay exacts its own unique costs. Delay at this incipient stage is particularly acute since there has been no showing that any substantial constitutional rights may be in issue. Without such a showing, the petitioner is in a "no-lose" situation in obtaining this delay, which typically permits subsequently appointed counsel to engage in a "fishing expedition" in the hope that one issue might be found.

This case is particularly illustrative of the problem. In this case nearly a year has elapsed since the district court issued its stay order and no federal habeas petition has been filed. Moreover, based on the district court's most recent order, no petition is due until September 15, 1994. (App., *infra*, 3a-4a.) At that point in time, more than 18 months will have elapsed during which time Clair has been permitted virtually unlimited access to the federal treasury for the purpose of a "fishing expedition" in the hope that he might find one single federal constitutional issue which *might* be used to challenge a presumptively correct state court judgment.

Moreover, since 1988, in California there have been 70 cases in which there was no federal habeas petition filed

but the federal district court nevertheless ordered a stay of execution. (App., *infra*, 52a-59a.) Thirty-five (35) of these cases remain outstanding, *i.e.*, no federal habeas petition has been filed. (App., *infra*, 52a-59a.)[8] The average delay involved in the 35 cases in which a habeas petition was filed following a pre-petition stay has been 429 days. (App., *infra*, 52a-59a.)

In *Blodgett*, this Court referred to the "severe prejudice" sustained by the State of Washington by a prolonged stay of execution and failure of the federal courts to resolve the case. *Blodget*, 116 L.Ed.2d at 674. As is clearly apparent from this case, as well as the other California capital cases involving pre-petition delay, unacceptable delay is the rule rather than the exception.

V. THE QUESTIONS PRESENTED ARE NOT MOOT INASMUCH AS THIS CASE PRESENTLY INVOLVES A PRE-PETITION STAY AND INVOLVES AN ISSUE CAPABLE OF REPETITION.

A case is moot if it has lost its character as a present live controversy. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). When the question sought to be adjudicated has been mooted by

---

[8] The oldest case is that involving James Willis Johnson. (App. *infra*, 55a.) In 1980, Johnson murdered his victim in the course of a robbery. He was sentenced to suffer the death penalty in 1982. The judgment was affirmed by the California Supreme Court in 1989 and a writ of ceriorari was denied by this Court on March 19, 1990.

Johnson's request for appointment of counsel was filed on November 9, 1990, in the U.S. District Court for the Northern District of California and, on January 7, 1991, the district court stayed Johnson's execution. *Johnson v. Vasquez*, No. CV90-3219-DLJ (stay order filed January 7, 1991). More than three years have elapsed without the filing of a petition for writ of habeas corpus.

developments subsequent to the filing of the complaint, no justiciable controversy is presented. *Flast v. Cohen*, 392 U.S. 83, 95, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). However, all subsequent events do not necesarily moot the issues presented. *Mancusi v. Stubbs*, 408 U.S. 204, 205-207, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972).

Moreover, questions capable of repetition are not moot. *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); *see also Anderson v. Celebrezze*, 460 U.S. 780, 784, n.3, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). Application of this exception to the mootness doctrine is appropriate in cases that would justify decision on the ground that the prospect of repetition is so close that the expired action continues to have a present impact. *See Meyer v. Grant*, 486 U.S. 414, 417 n.2, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988).

At the time the court below dismissed the appeals (as well as currently), this case involved a pre-petition stay. Although counsel has been appointed, no petition has yet been filed and it is expected no petition will be filed until September 1994, or later. Moreover, in 17 other California capital cases now pending before the U.S. District Court for the Central District of California a pre-petition stay of execution has been granted. (App., *infra*, 56a-60a.) In these cases, although execution has been stayed, no petition for writ of habeas corpus has been filed.

(App., *infra*, 55a-59a.)[9] Thus, in concluding the appeals were moot the court of appeal failed to recognize that, so long as the case involved a pre-petition stay and, in view of the fact that it was easily capable of repetition, the matter had not lost its character as a present live controversy.

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[9] The same situation prevails in 10 cases now pending in the U.S. District Court for the Northern District of California; in five cases now pending in the U.S. District Court for the Eastern District of California; and in one case now pending in the U.S. District Court for the Southern District of California. (App., *infra*, 54a-59a.)

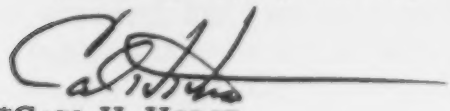
CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: March 15, 1994

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General of California
GEORGE H. WILLIAMSON,
Chief Assistant Attorney General
GARY W. SCHONS,
Senior Assistant Attorney General
PAT ZAHAROPOULOS,
Supervising Deputy Attorney General



*CARL H. HORST,
Deputy Attorney General

Attorneys for Petitioners

*Counsel of Record

CHH
SD94XU0002
03/15/94

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

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Attorneys for Petitioner

110 West A Street, Suite 1100
P.O. Box 85266
San Diego, CA 92186-5266

No.

October Term, 1993

Arthur Calderon, Warden, and
Daniel E. Lungren, Attorney
General of California,
Petitioners

v.

Kenneth Clair,
Respondent

I, the undersigned, hereby declare that I am a citizen of the United States, that I am 18 years of age or older, that I am employed in the County of San Diego, State of California, in which county the below stated mailing occurred, that I am not a party to the subject cause, and that my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

I further declare that I have caused the within

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

to be served on:

William K. Sutter, Clerk, Supreme Court of the United States, Washington, DC 20543, an original and 40 copies;

and by placing one or more copies in a separate envelope addressed to each addressee named below which envelope was then sealed and, with postage prepaid, deposited in the United States mail by me at San Diego,California, on the 15th day of March 1994:

Cathy Catterson, Clerk
U.S. Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

U.S. District Court
Hon. G.L. Taylor
751 W. Santa Ana Blvd
Santa Ana, CA 92701-4793

U.S. District Court
Attn: Tracy Dressner
312 N. Spring Str., Rm G8
Los Angeles, CA 90012-4793

Henry H. Rossbacher
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445 S. Figueroa Str, 24th Flr.
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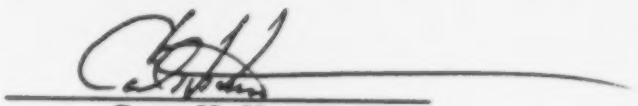
Kenneth Clair
P.O. Box D-73000, 1-E-115
Tamal, CA 94974

California Appellate Project
611 Wilshire Blvd, Ste. 200
Los Angeles, CA 90007-2928

I further declare that there is delivery service by the United States Postal Service and/or private courier service at each place so addressed, or regular communication by the United States Postal Service and/or private courier service between the place of mailing and each place so addressed.

I hereby further declare, under penalty of perjury, that the foregoing is true and correct.

Dated at San Diego, California, this the 15th day of March, 1994.



CARL H. HORST,
Deputy Attorney General

Supreme Court, U.S.
FILED
No. 93 1454 MAR 15 1994
OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1993

ARTHUR CALDERON, WARDEN
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Petitioner,

v.

KENNETH CLAIR,
Respondent

Appendix to the Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

DANIEL E. LUNGREN
Attorney General of California
GEORGE H. WILLIAMSON,
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March 15, 1994

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for the Central District of California
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for the Central District of California
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
DEC 30 1993

KENNETH CLAIR,	
Petitioner-Appellee,	Nos. 93-99004 & 93-99010
vs.	D.C. No. 93-1133-GLT
DANIEL B. VASQUEZ,, as Warden of San Quentin State Prison	ORDER
Respondent-Appellant)	

Before: D.W. NELSON, NOONAN and LEAVY, Circuit Judges

The order, filed on December 2, 1993, is withdrawn.
These appeals are hereby dismissed as moot.
The motion for costs and attorney's fees is denied.
IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
NOV 12 1993
ENTERED
NOV 16 1993

KENNETH CLAIR,	)	DEATH PENALTY
	)	
Petitioner,	)	Case No. CV 93-1133-GLT
	)	
v.	)	ORDER SETTING THE FILING DATE DATE FOR THE PETITION AND STAYING THE SETTING OF AN EXECUTION DATE
	)	
DANIEL VASQUEZ, Warden of California State Prison at San Quentin,	)	
	)	
Respondent.	)	

The Court discussed the filing date for the petition for writ of habeas corpus at the status conference held on November 5, 1993. Having considered the position of both parties, the Court orders petitioner to file his petition for writ of habeas corpus no later than September 15, 1994.

The Court further orders that the execution of the sentence of death imposed upon Kenneth Clair, and any proceedings related to the setting of an execution date, be

stayed until September 19, 1994 to allow petitioner to file his petition for writ of habeas corpus.

IT IS SO ORDERED.

Dated: November 12, 1993

/s/G.L. Taylor

Gary L. Taylor
United States District Judge

Henry H. Rossbacher, Esq. (SB #060260)
Linda L. Griffis, Esq. (SB #100827)
ROSSBACHER & ASSOCIATES
Union Bank Plaza, 24th Floor
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(213) 895-6500

Attorneys for Petitioner
KENNETH CLAIR

FILED
OCT 7 1993

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR, Petitioner, vs. DANIEL VASQUEZ, as Warden of San Quentin State Prison, Respondent.	Case No. CV 93-1133-GLT DEATH PENALTY ORDER STAYING EXECUTION

Upon application of Henry H. Rossbacher, appointed counsel for petitioner Kenneth Clair, and good cause appearing therefor,

IT IS HEREBY ORDERED AS FOLLOWS:

The execution of the sentence of death imposed upon Kenneth Clair is hereby stayed for an additional one hundred and twenty (120) days to an including February 11, 1994.

IT IS SO ORDERED.

Dated: October 7, 1993

/s/G.L. Taylor

THE HONORABLE GARY L. TAYLOR
United States District Court Judge

Presented by:

ROSSBACHER & ASSOCIATES
445 S. Figueroa Str., 24th Floor
Los Angeles, CA 90071
(213) 895-6500

/s/Linda L. Griffis

Linda L. Griffis

Henry H. Rossbacher, Esq. (SB #060260)
Linda L. Griffis, Esq. (SB #100827)
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(213) 895-6500

Attorneys for Petitioner
KENNETH CLAIR

FILED
JUL 28 1993
ENTERED
JUL 29 1993

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR, Petitioner, vs. DANIEL VASQUEZ, as Warden of San Quentin State Prison, Respondent.	Case No. CV 93-1133-GLT DEATH PENALTY ORDER CONTINUING FILING FOR SPECIFICATION OF NONFRIVOLOUS ISSUES AND EXTENDING STAY OF EXECUTION

Upon application of Henry H. Rossbacher, appointed counsel for petitioner Kenneth Clair, and good cause appearing therefor,

IT IS HEREBY ORDERED AS FOLLOWS:

(1) The Specification of Nonfrivolous Issues required by the Central District's Local Rule 26.8.7(c) shall be filed in this matter on or before October 11, 1993.

(2) The execution of the sentence of death imposed upon Kenneth Clair is hereby stayed for an additional sixty (60) days to and including October 11, 1993.

IT IS SO ORDERED.

Dated: July 27, 1993

/s/G.L. Taylor

THE HONORABLE GARY L. TAYLOR
United States District Court Judge

Presented by:

ROSSBACHER & ASSOCIATES
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Los Angeles, CA 90071
(213) 895-6500

/s/Linda L. Griffis

Linda L. Griffis

Attorneys for Petitioner
KENNETH CLAIR

Kenneth CLAIR, Petitioner
v.
Daniel VASQUEZ, Respondent

No. CV 93-1133-GLT

July 23, 1993

United States District Court
Central District of California

ORDER DENYING RESPONDENT'S MOTION TO VACATE STAY OF EXECUTION

TAYLOR, District Judge.

Respondent moves the Court in this death penalty case to vacate a 45-day stay of execution. The motion is DENIED.

I. BACKGROUND

Petitioner is a death-sentenced prisoner. In February 1993, petitioner filed a request for appointment of counsel in his federal habeas corpus proceeding, and moved to stay his April 1993 execution. Respondent opposed the stay, arguing that the Court lacked jurisdiction to enter a stay absent the filing of a petition for writ of habeas corpus. In March 1993, this Court granted a 45-day stay of execution and forwarded petitioner's request for appointment of counsel to the Attorney Selection Board for the Central District of California. See Central District of California, Local Rule 26.8.4(a). Respondent appealed the stay order, and the appeal is now pending. *See Vasquez v. Clair*, Ninth Circuit Case No. 93-99004.

In May 1993, Michael Millman, director of California Appellate Project and member of the Attorney Selection Board, requested an additional 45-day stay of execution to allow the Selection Board more time to find counsel for the petitioner. The Court granted an additional 45-day stay. Respondent moved to vacate the May stay of execution. [1/]

Respondent contends Mr. Millman was not retained or appointed on behalf of petitioner, nor did he qualify as a "next friend," so the Court lacked jurisdiction to entertain Millman's request for an extension. Respondent also asserts the Court had no jurisdiction to stay an execution when no petition for writ of habeas corpus had been filed.

II. DISCUSSION

I. *Mr. Millman's Authority to Request a Stay.*

Respondent argues there is no basis for federal jurisdiction to extend the stay since the request came from Mr. Millman, rather than from petitioner. Specifically, respondent contends that, without a showing petitioner lacks mental capacity to litigate his own case, or Mr. Millman represents petitioner, Mr. Millman's request cannot be considered by the Court.

Respondent's challenge to Mr. Millman's authority to request the stay of execution is well-taken. Petitioner has standing to petition for a writ of habeas corpus and

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1 While the Motion has been pending, the May stay expired, the court issued a new temporary stay at Mr. Millman's request, and permanent counsel was thereafter found and appointed. However, because of the importance of this issue, the court will not deem the matter moot and will decide it on its merits.

seek a stay, either by himself or through one representing him. However, Mr. Millman does not represent petitioner, and has no legal authority to act on petitioner's behalf. Local Rule 26.8.7(b).

Mr. Millman was not acting as petitioner's "next friend." A next friend is not a party to a habeas corpus proceeding, but pursues the cause on behalf of the petitioner who remains the real party in interest. *See Whitmore v. Arkansas*, 495 U.S. 149, 163, 110 S.Ct. 1717, 1727, 109 L.Ed.2d 135 (1990). A necessary prerequisite for the "next friend" status is a showing that the real party cannot present his own case due to mental incapacity, lack of access to Court, or some other disability. *Id.* at 165, 110 S.Ct. at 1728. No such claim is made here.

In seeking a stay of petitioner's execution, Mr. Millman was acting in his capacity as a member of the Attorney Selection Board. Local Rule 26.8.7(b) authorizes an attorney-member of the Attorney Selection Board, such as Mr. Millman, to assist an indigent petitioner in filing *pro se* applications for appointment of counsel and temporary stay of execution. The rule, however, contemplates that the petitioner, not the selection board attorney, will make the actual request for a stay of execution.[2/] However, the circumstances of this case do

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2 This is not the situation where a condemned inmate did not wish to fight his death sentence, but someone else attempted to do so on his behalf. *See e.g., Whitmore*, 495 U.S. 149, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)(fellow death row inmate); *Lenhard v. Wolff*, 443 U.S. 1306, 100 S.Ct. 3, 61 L.Ed.2d 885 (Rehnquist, Circuit Justice 1979)(inmate's attorney); *Gilmore v. Utah*, 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976)(Mem., Burger, J., concurring)(inmate's mother).

not require vacation of the previously granted stay of execution. The Court requested the assistance of the Attorney Selection Board in finding appropriate counsel for petitioner. To accommodate the search, the Court granted petitioner's personal request for the first stay of execution. As the stay expiration drew near, it was the selection board, not petitioner, who was in the best position to provide the Court with a status report on the search for counsel and a time estimate to complete the task. In the absence of a Court ruling on the point, it is understandable that Mr. Millman would make the application for additional time. It would be unfair to petitioner to set aside the stay on that basis. It is within the Court's discretion to disregard this defect. *See Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990.)

II. *The Court's Jurisdiction to Enter a Stay.*

Respondent asserts this Court lacked jurisdiction to enter a stay of execution without petitioner having first filed his petition for writ of habeas corpus. The Ninth Circuit rejected this argument in *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1778, 118 L.Ed.2d 435 (1992). *Brown* holds that a district court has jurisdiction to stay the execution of a state prisoner in order to appoint counsel to assist the prisoner in preparing and filing a petition for federal habeas corpus relief. Id. at 1165.

This Court exercised the jurisdiction that *Brown* found to be proper. Respondent's attempt to distinguish *Brown* by challenging the validity of the local rules is without merit. *Brown* specifically held that an application

for appointment of counsel under Local Rule 26.8.7(b) constitutes part of a habeas corpus proceeding under 28 U.S.C. § 2254 sufficient to grant the district court jurisdiction to enter a stay of execution. While the local rules also recognize this court's jurisdiction, this Court relied on *Brown*, not just the local rules, in granting the stay. [3]

The Office of the Attorney General of California continues to assert a position that is contrary to established Ninth Circuit case law. The Court takes judicial notice that respondent has raised seven jurisdictional challenges in the Central District to stays of execution pending the filing of a petition. The motion to vacate the stay in Brown was originally denied and the denial was affirmed by the Ninth Circuit. The United States Supreme Court denied certiorari. Respondent filed another motion to vacate a stay in *Thompson, v. Vasquez*, CV 90-6605-JMI. This Court denied the motion and the Ninth Circuit affirmed, citing *Brown*. *Vasquez v. Thompson*, No. 91-55525, 1992 WL 46686. Petition for certiorari was also denied. *See* ___ U.S. ___, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992). Respondent then filed motions to vacate stays of execution in *Fields v. Vasquez*, CV 92-0465-RG; *Anderson v. Vasquez*, CV 92-0488-JGD; *Deere v. Vasquez*, CV 92-1684-GLT; and *Frank v. Vasquez*, CV 91-6287-AHS, as well as filing an earlier motion in this case. In all

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3 The fact that the appellants in *Brown* did not challenge the validity of the local rules does not mean that the local rules are somehow invalid. 952 F.2d at 1168. If anything, *Brown* suggests an implicit validation of the local rules relating to appointment of counsel and stays of execution.

instances, this Court rejected the motions to vacate, citing *Brown*. Despite repeated rejection of the position, respondent is currently appealing the denials in *Deere* (Ninth Circuit No. 92-55648) and in this case (Ninth Circuit No. 93-99004).

Respondent flatly asserts that the district court has no jurisdiction to order a stay of execution, while relegating the controlling contrary Brown to a "but see" citation. Respondent provides only a Daily Appellate Report citation for *Brown*, notwithstanding that *Brown* was decided over a year ago, has an F2d cite, and (not discussed by respondent) the United States has denied certiorari.

Respondent is close to the line between advocacy and frivolousness on this issue. The filing of future such motions that are contrary to established Ninth Circuit law will be carefully scrutinized under Rule 11.

III. DISPOSITION

Respondent's motion to vacate the stay of execution is DENIED.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
JUL 12 1993
ENTERED
JUL 21 1993

KENNETH CLAIR,	)	Case No. CV-93-1133-GLT
Petitioner,	)	ORDER FOR EXTENSION OF STAY OF EXECUTION
v.	)	
DANIEL VASQUEZ, Warden of California State Prison at San Quentin,	)	DEATH PENALTY CASE
Respondent.	)	

Upon application of MICHAEL G. MILLMAN of the Selection Board for the United States District Court for the Central District of California, and good cause appearing therefore,

Pursuant to Local Rule 26.8.7(b), it is hereby ordered that the execution of the sentence of death imposed

upon KENNETH CLAIR be stayed for an additional thirty (30) days, to and including August 11, 1993.

Dated: July 9, 1993

/s/G.L. Taylor

United States District Judge

SUBMITTED BY:

/s/ Michael G. Millman

MICHAEL G. MILLMAN
Selection Board

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LODGED
MAY 26 1993
FILED
MAY 27 1993

KENNETH CLAIR, Petitioner, v. DANIEL VASQUEZ, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-93-1133-GLT ORDER FOR EXTENSION OF STAY OF EXECUTION DEATH PENALTY CASE

Upon application of MICHAEL G. MILLMAN of the Selection Board for the United States District Court for the Central District of California, and good cause appearing therefore,

Pursuant to Local Rule 26.8.7(b), it is hereby ordered that the execution of the sentence of death imposed

upon KENNETH CLAIR be stayed for an additional forty-five (45), to and including July 12, 1993.

Dated: May 27, 1993

/s/G.L. Taylor

United States District Judge

SUBMITTED BY:

/s/ Michael G. Millman

MICHAEL G. MILLMAN
Selection Board

MICHAEL G. MILLMAN
Selection Board for the United States District Court,
Central District of California
California Appellate Project
One Ecker Place, 4th Floor
San Francisco, CA 94105
(415) 495-0500

On behalf of KENNETH CLAIR

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR, Petitioner, v. DANIEL VASQUEZ, as Warden of San Quentin State Prison, Respondent.	Case No. CV-93-1133-GLT APPLICATION FOR EXTENSION OF STAY OF EXECUTION (LOCAL RULE 26.8.4(a); 26.8.7(b)) DEATH PENALTY CASE

MICHAEL G. MILLMAN, a member of the Selection Board for the United States District Court for the Central District of California, acting on behalf of KENNETH CLAIR, hereby requests, pursuant to Local Rule 26.8.7(b), that the forty-five (45) day stay of execution to May 28, 1993, previously ordered by this

Court be extended for an additional forty-five (45) days, to and including July 12, 1993.

KENNETH CLAIR is presently under judgement of death in Orange County Superior Court, Case No. C-57572. That judgment was affirmed on direct appeal by the California Supreme Court on May 7, 1992. People v. Clair, 2 Cal4th 629 (1992). The United States Supreme Court denied Mr. Clair's petition for writ of certiorari on January 11, 1993. The Orange County Superior Court ordered an execution date set for April 13, 1993. On February 26, 1993, pursuant to Local Rule 26.8.7(b), petitioner submitted a pro se Request for Appointment of Counsel and for Stay of Execution. On March 1, 1993, this Court granted a temporary stay of execution for forty-five (45) days, to and including May 28, 1993.

Pursuant to Local Rule 26.8.4(a)(iv), the Selection Board has been attempting to identify counsel to suggest for appointment to represent petitioner in these federal habeas corpus death penalty proceedings. These efforts have been hampered by recent publicity regarding the anticipated cessation of payments to panel attorneys under the Criminal Justice Act, 18 U.S.C. § 3006A. An additional forty-five (45) days is necessary for the Selection Board to complete the process of recommending the appointment of counsel, and for newly appointed counsel to file a specification of nonfrivoulous issues, pursuant to Local Rule 26.8.7(c), that will entitle counsel to a further stay of 120-days in which to prepare the habeas corpus petition.

Accordingly, I request that the Court extend its present stay of execution for an additional forty-five (45) days, to and including July 12, 1993.

DATED: May 25, 1993 Respectfully submitted,

/s/ Michael G. Millman

MICHAEL G. MILLMAN
Selection Board for the
United States District Court,
Central District of California

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LODGED
FEB 26 1993
FILED
MAR 2 1993
ENTERED
MAR 4 1993

KENNETH CLAIR,	)	Case No. 93-1133-GLT
	)	
Petitioner,	)	DEATH PENALTY
	)	CASE
	)	EXECUTION
	)	IMMINENT
v.	)	[Execution
	)	Date:4/13/93]
	)	TEMPORARY STAY
	)	OF EXECUTION
DANIEL VASQUEZ,	)	
Warden of California	)	
California State Prison at	)	(LOCAL
San Quentin	)	RULES 26.8.4(iv)
Respondent.	)	and 26.8.7(b))
	)	

It appearing to the court that petitioner, KENNETH CLAIR, seeks the appointment of counsel pursuant to Local Rule 26.8.4(iv); that the Superior Court of Orange County has set an execution date of April 13, 1993; that petitioner has filed an application for appointment of counsel and for temporary stay of execution to permit the appointment of counsel; and that Local Rule 26.8.7(b) provides for an issuance of a temporary stay of execution to permit selection and appointment of counsel upon application by petitioner,

IT IS HEREBY ORDERED that the execution be STAYED to permit appointment of counsel. The Warden of San Quentin Prison is ordered to stay the execution of Kenneth Clair, scheduled for April 13, 1993, for forty-five (45) days, to and including May 28, 1993, unless extended by the Court.

DATED: March 1, 1993

/s/G.L. Taylor

UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

/s/ Michael G. Millman

MICHAEL G. MILLMAN
California Appellate Project

Kenneth Clair
P.O. Box D-7300, 1-E-115
Tamal, CA 94974

In Propria Persona

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR,	)	Case No. _____
	)	DEATH PENALTY
Petitioner,	)	CASE
	)	EXECITION
v.	)	IMMINENT
	)	[Execution date:
DANIEL VASQUEZ, as	)	4/13/93]
Warden of California State	)	REQUEST BY
Prison at San Quentin,	)	PRISONER FOR
	)	APPOINTMENT OF
Respondent.	)	COUNSEL IN
	)	CALIFORNIA DEATH
	)	SENTENCE CASE
	)	AND FOR STAY OF
	)	EXECUTION OF
	)	DEATH SENTENCE
_____	)	

I, Kenneth Clair, request that this Court appoint an attorney to represent me in federal habeas corpus proceedings in my death sentence case. (Local Rule 26.8.4(iv).)

On January 11, 1993, the United States Supreme Court denied a timely petition for a writ of certiorari (No. 92-6563), filed by counsel on my behalf, after affirmance of the judgment of death by the California Supreme Court on May 7, 1992.

The Orange County Superior Court has set April 13, 1993 as the date for the execution of the judgment of death.

As set forth in the accompanying declaration, the attorney appointed to represent me in state proceedings is not available to represent me in federal habeas corpus proceedings.

WHEREFORE, under Central District of California Local Rule 26.8.4(iv), I request that competent and qualified counsel be appointed to represent me in federal habeas corpus proceedings. I further request that this Court stay the execution of my sentence, scheduled for April 13, 1993, for forty-five days from that date to permit the appointment of counsel, pursuant to Local Rule 26.8.7(b).

Dated: Feb. 22, 1993

Respectfully submitted,

/s/Kenneth Clair

KENNETH CLAIR

Kenneth Clair
P.O. Box D-7300, 1-E-115
Tamal, CA 94974

In Propria Persona

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KENNETH CLAIR, Petitioner, v. DANIEL VASQUEZ, as Warden of California State Prison at San Quentin, Respondent.	Case No._____ DEATH PENALTY CASE EXECITION IMMINENT [Execution date: 4/13/93] DECLARATION IN SUPPORT OF REQUEST BY PRISONER FOR APPOINTMENT OF COUNSE IN CALIFORNIA DEATH PENALTY CASE AND FOR STAY OF EXECUTION OF DEATH SENTENCE

I, Kenneth Clair, request that this Court appoint an attorney to represent me in federal habeas corpus litigation to be initiated in the federal courts on my behalf. In support of this request, I hereby declare:

1. I was sentenced to death in the Orange County Superior Court, State of California, on December 4, 1987. I am incarcerated at San Quentin Prison, located in San Quentin, California.

2. My death sentence was affirmed by the California Supreme Court on May 7, 1992. On January 11, 1993, the United States Supreme Court denied my timely petition for a writ of certiorari (No. 92-6563).

3. I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors which entitle me to relief from the judgment of death. I need the assistance of counsel in preparing and litigating the petition.

4. The attorney who represented me in the most recent state court proceedings was John N. Hauser of San Francisco, California, and he is unable to represent me in these federal habeas corpus proceedings.

5. I cannot afford to retain an attorney to represent me in these proceedings. I am indigent and consequently have no assets.

I declare under penalty of perjury that the above statements are true and correct.

Dated: Feb. 22, 1993

/s/Kenneth Clair

KENNETH CLAIR

APPENDIX B

John G. BROWN, Petitioner-Appellee
v.
Daniel VASQUEZ, Warden, Daniel E. Lungren,
Attorney General of the State of California

No. 90-56127

Decided December 31, 1991
As Amended February 19, 1992

Appeal from the United States District Court
for the Central District of California.

Before FLETCHER, THOMPSON and Leavy, Circuit Judges

DAVID R. THOMPSON, Circuit Judge:

John G. Brown is a California state prisoner who has been sentenced to death. His conviction and sentence were affirmed by the California Supreme Court. *People v. Brown*, 46 Cal.3d 432, 250 Cal.Rptr. 604, 782 P.2d 1135 (1988). His petition for a writ of certiorari was denied by the United States Supreme Court. *Brown v. California*, 489 U.S. 1059, 109 S.Ct. 1329, 103 L.Ed.2d 597 (1989). His petition for a writ of habeas corpus filed with the California Supreme Court was denied. His execution was scheduled for June 8, 1990.

On June 1, 1990, Brown, proceeding pro se, filed in the United States District Court for the Central District of California a "Request for Appointment of Counsel in Death Sentence Case and For Stay of Execution of Death Sentence." In an accompanying declaration he stated that he was under imminent sentence of death, that the attorney who represented him in state court was unavailable to

represent him in his federal habeas proceeding, and that he could not afford to retain an attorney. He further stated: "I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors which entitled me to relief from the judgment of death. I need the assistance of counsel in preparing the petition."

Pursuant to its Local Rule 26.8.7(b),[4] the district court ordered Brown's execution stayed for forty-five days. The district court subsequently extended the stay of an additional thirty days, citing as a primary reason difficulty in finding appointed counsel to represent Brown. On July 30, 1990, counsel was appointed to represent Brown. On August 10, 1990, at appointed counsel's request and pursuant to the Central District's Local Rule 26.8.7(c),[5]

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4 Local Rule 26.8.7(b) provides in relevant part:

> "Where counsel in state court proceedings . . . is . . . not available or qualified to proceed, the selection panel will designate an attorney from the panel who will assist an indigent petitioner in filing *pro se* applications for appointment of counsel and for temporary stay of execution. Upon filing of this application the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay will remain in effect for forty-five (45) days unless extended by the court."

5 Local Rule 26.8.7(c) states that:

> "Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivoulous issues to be raised in the petition, the district court shall issue a temporary stay of execution unless no nonfrivoulous issues are presented. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition."
>
> Following his appointment, Brown's attorney satisfied the requirements of this section by

the district court granted an additional stay of 120 days to afford appointed counsel time to prepare and file Brown's habeas petition.

The state respondents moved to vacate the stay of execution. They contended the district court lacked jurisdiction because Brown had not filed a petition for habeas corpus relief, and thus, they argued, there was no proceeding pending before the district court on which to predicate a stay order under 28 U.S.C. § 2251. [6]

The district court denied the motion. It held that it had jurisdiction under the All Writs Act [7] to issue any

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identifying six nonfrivolous and independent constitutional issues which he intended to raise in the habeas corpus petition. *Brown v. Vasquez*, 743 F.Supp. 729, 732, n. 10 (C.D. Cal. 1990).

6 This section provides:

> "A justice or judge of the United States before whom a habeas corpus proceeding is pending may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any state for any matter involved in the habeas corpus proceeding.
>
> After the granting of such a stay, any such proceeding in any state court or by or under the authority of any state shall be void. If no stay is granted, any such proceeding shall be valid as if no habeas corpus proceeding or appeal were pending."

7 The All Writs Act appears at 28 U.S.C. § 1651(a). It provides that, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Appellant's argue that the All Writs Act is superseded for purposes of this case by 28 U.S.C. § 2283 (the Anti-Injunction Act), and therefore cannot serve as the jurisdictional basis for the district court's action. We do not address the merits of this claim because we concluded that 28 U.S.C. § 2251 provides an adequate independent basis for the district court's exercise of jurisdiction.

orders necessary to preserve its potential jurisdiction, including a stay of execution in anticipation of the filing of a petition for a writ of habeas corpus. *Brown v. Vasquez*, 743 F.Supp. 729, 732 (C.D. Cal. 1990). The state respondents appeal. We affirm, although for reasons different from those stated by the district court.

DISCUSSION

The issue presented by this appeal is whether a district court has jurisdiction to stay the execution of a state prisoner in order to appoint counsel to assist the prisoner in preparing and filing a petition for federal habeas corpus relief. We conclude a district court has such jurisdiction. We have appellate jurisdiction under 28 U.S.C. § 1292(a)(1) [1].

When a death penalty prisoner has a habeas corpus proceeding pending before a federal district court, that court has jurisdiction to stay the prisoner's execution. 28 U.S.C. § 2251. Appellant's contend that a "habeas corpus proceeding" cannot be considered "pending" before a district court under section 2251 until something has been filed with the court that can be interpreted as a petition for a writ of habeas corpus. [2] Appellants point out that what

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8 This section provides, in relevant part that "[t]he courts of appeals shall have jurisdiction of appeals from . . . interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . ."

9 The procedural and substantive requirements for a petition for writ of habeas corpus are found at 28 U.S.C. § 2242. This section is augmented by Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts.

Brown filed was not a habeas petition, but simply a request and declaration seeking appointment of counsel to help him prepare a habeas petition. We agree that what Brown filed should not be interpreted as a petition for writ of habeas corpus.[10/] But this does not end the inquiry.

The Supreme Court has recognized that "[t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris v. Nelson*, 394 U.S. 286, 290-91, 89 S.Ct. 1082, 1086, 22 L.Ed.2d 281 (1969). It is, in essence, "the first line of defense against constitutional violations." *Bounds v. Smith*, 430 U.S. 817, 828, 97 S.Ct. 1491, 1498, 52 L.Ed.2d 72 (1977).

Given the fundamental importance of the writ, it is essential that it be "administered with the initiate and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected." *Harris*, 394 U.S. at 291, 89 S.Ct. at 1086. The Court has "consistently rejected interpretations of the habeas corpus state [11/] that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley v. Municipal Court*, 411

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10 While recognizing that the federal courts have a responsibility to construe liberally *pro se* prisoners' vaguely-framed pleadings as habeas petitions where the interests of justice demand, *see, e.g., Taylor v. United States*, 929 F.2d 451 (9th Cir. 1991) (construing "Motion under 28 U.S.C. § 2255" as a petition for habeas under 28 U.S.C. § 2241); *Tucker v. Carlson*, 925 F.2d 330 (9th Cir. 1990) (section 1983 and *Bivens* action construed as habeas), what Brown filed here was a request for counsel to help him prepare and file a petition, not, in itself, a petition for writ of habeas corpus.

11 The federal habeas corpus statue is set forth at 28 U.S.C. §§ 2241 to 2255.

U.S. 345, 350, 93 S.Ct. 1571, 1574, 36 L.Ed.2d 294 (1973).

In *Hensley*, the Court was called upon to determine whether a state prisoner who had been released on his own recognizance was "in custody" for purposes of the federal habeas statute. [12] In holding that habeas relief is not restricted to situations where the petitioner is subject to present physical confinement, the Court emphasized that "habeas corpus is not 'a static, narrow, formalistic remedy,' but one which must retain the 'ability to cut through barriers of form and procedural mazes.'" *Id.* 411 U.S. at 349-50, 93 S.Ct. at 1573-74 (quoting *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S.Ct. 373, 377, 9 L.Ed.2d 285 (1963), and *Harris*, 394 U.S. at 291, 89 S.Ct. at 1086).

The *Harris* admonition to interpret the federal habeas corpus statute with "initiative and flexibility" is especially relevant in the present case in light of the court's recent decision in *McCleskey v. Zant*, ___ U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). In *McCleskey*, the Court held that the doctrine of abuse of the writ [13] barred a prisoner from asserting a constitutional claim in a subsequent federal habeas corpus proceeding when he had

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12 In *Hensley*, the Court was interpreting section 2243(c)(3) which limits the availability of habeas corpus relief to a prisoner who "is in custody in violation of the Constitution or laws or treaties of the United States."

13 The doctrine of abuse of the writ "refers to a complex and evolving body of equitable principles" which determine whether a habeas corpus petitioner can bring a federal constitutional claim in a habeas action when he failed to assert the claim in a prior habeas proceeding. *McCleskey*, 111 S.Ct. at 1467.

not raised the claim in his initial federal application and could not show either good cause for failing initially to raise the claim and prejudice resulting from such failure, or that a fundamental miscarriage of justice would result if the claim were not entertained. *McCleskey*, 11 S.Ct. at 1470. The Court also restated its position taken in *Antone v. Dugger*, 465 U.S. 200, 205-06 & n. 4, 104 S.Ct. 962, 964-65 & n. 4, 79 L.Ed.2d 147 (1984) (per curiam), that a habeas petitioner will not be excused from failing to raise a claim in his first federal petition on the ground that his counsel had to prepare the first petition in haste and did not have time to become familiar with the case. *McCleskey*, 111 S.Ct. at 1467.

Given the teaching of McCleskey, a prisoner applying for habeas relief in federal court must assert all possible violations of his constitutional rights in his initial application or run the risk of losing what might be a viable claim. This is a substantial burden. Compounding this burden, the petitioner is often illiterate or poorly educated and yet must decipher a complex maze of jurisprudence in order to determine which of his constitutional rights, if any, may have been violated. Such a task is "difficult even for a trained lawyer to master," and, understandably, is often beyond the abilities of most prisoners. Murray v. Giarratano, 492 U.S. 1, 28, 109 S.Ct. 2765, 2780, 106 L.Ed.2d 1 (1989). (Stevens, J., dissenting). It is thus not surprising that when a prisoner attempts to prepare his own habeas petition without the assistance of counsel, the product of his efforts is often a confusing and incomprehensible amalgam of claims which not only fails to protect the prisoner, but which ties up valuable court

time in the inevitable struggle to comprehend what it is that is being alleged. [14]

The Supreme Court has recognized the inherent problems faced by prisoners, and by the courts, when prisoners are forced to file habeas petitions pro se. In *Johnson v. Avery*, the Court held that a state could not bar prisoners from furnishing assistance to other prisoners in filing habeas corpus petitions. It recognized, however, that even with the help of experienced prison "writ-writers," petitions filed without the assistance of an attorney are "often so unskillful as to be a burden on the courts, which receive them." 393 U.S. 483, 488, 89 S.Ct. 747, 750, 21 L.Ed.2d 718 (1969). In his concurrence, Justice Douglas argued that the pre-petition assistance of an attorney would greatly benefit both the prisoner and the court system:

> "A lawyer, after examining the prisoner's transcripts or conducting an independent investigation of the facts, could

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14 In a report of the Committee on Habeas Corpus, a group of circuit judges addressed the problems faced by the judiciary in dealing with pro se petitions for habeas relief:

> "Much of the judges' time is spent trying to decipher and interpret the chaotic papers that come to him from prison inmates. Many of the petitioners are illiterates, or persons of limited education who depend upon "jailhouse lawyers" for assistance in preparing these documents. Not only are such practitioners notoriously unreliable, but their work product is often a mass of confused and incomprehensible mumbo-jumbo."

Application for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts, 33 F.R.D. 364, 384 (1983). *See also*, Marshall W. Krause, *A Lawyer Looks at Writ-Writing*, 56 Calif.L.Rev. 371, 376 (1968) ("the number of frivolous petitions filed would be greatly reduced if prisoners could have an objective evaluation of their chance before filing their petitions").

> immediately advise him on a course of action. Lacking the money to hire a lawyer, the prisoner must spend considerable time researching the law, preparing the required legal documents, and filing them. Sometimes years pass before the prisoner discovers what a lawyer could have told him in several weeks -- that his case either has or lacks merit. The prisoners who have militantly prosecuted frivolous actions have wasted time they could have devoted to preparing themselves for release from prison. The state, by shouldering these indigent prisoners with the responsibility of acting as their own counsel, has dissipated the taxpayers' money in wasted manpower and court costs."

Id. at 494, n. 10, 89 S.Ct. at 753, n. 10 (Douglas J., concurring)(quoting Charles Larsen, *A Prisoner Looks at Writ-Writing*, 56 Calif.L.Rev. 343, 345-546 (1968).

Notwithstanding the foregoing, as the Court in *McCleskey* reasserted, there is no constitutional right to counsel in federal habeas corpus proceedings. *McCleskey*, 111 S.Ct. at 1471, citing *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539 (1987), even if the habeas petitioner may be facing a sentence of death. *Murray*, 492 U.S. at 10, 109 S.Ct. at 2770-71. In his concurrence in *Murray*, however, Justice Kennedy recognized that "[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief

without the assistance of persons learned in the law." *Id.* at 14, 109 S.Ct. at 2772-73 (Kennedy, J., concurring).

Justice Stevens dissented in Murray. In arguing that a constitutional right to counsel should exist in the initial stages of a habeas corpus proceeding, he emphasized the many obstacles faced by an incarcerated habeas prisoner, as well as the tremendous drain that pro se habeas petitions place upon the judicial system:

> "The State already appoints counsel to death row inmates who succeed in filing postconviction petitions asserting at least one nonfrivoulous claim; therefore, the additional cost of providing . . . death row inmates competent counsel to prepare such petitions should be minimal. [citation omitted]. Furthermore, multiple filings delay the conclusion of capable litigation and exacerbate the already serious burdens these cases impose on the State's judicial system and the legal department. It seems obvious that professional preparation of the first postconviction petition, by reducing successive petitions would result in a net benefit [to the court system]."

Murray, 492 U.S. at 29-30, 109 S.Ct. at 2781 (Stevens, J. dissenting). [15]

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15 Justices Brennan, Marshall and Blackmun joined the dissent. When combined with Justice Kennedy and O'Conner, who joined in the concurrence, a total of six members of the Court took express notice of the plight confronting inmates attempting to challenge their conviction by habeas corpus without the assistance of counsel.

The Central District of California's Local Rules 26.8.7(b) and (c) address the foregoing concerns. These rules authorize the appointment of counsel to assist a death penalty prisoner in preparing and filing a habeas petition, and provide for issuance of a stay of execution pending this process.

The appellants do not challenge the validity of these rules. Rather, they argue that a prisoner who seeks the appointment of counsel and a stay of execution under the rule must allege some federal constitutional violation to provide the district court with a necessary habeas "proceeding" to give it a jurisdictional base to support a stay of execution. The appellants assert it is a minor burden at most to require a prisoner to allege some constitutional violation. They argue all the prisoner need do is file something that can be interpreted as a habeas corpus petition, no matter how inartfully it may be drawn. Thereupon, according to the thrust of the appellants' argument, a long-suffering district court through the process of reviewing the petition and allowing amendments will assist the prisoner in eventually coming up with a reasonably adequate habeas petition.

We reject this argument. The Central District rules do not require the filing of a habeas petition as a prerequisite to the issuance of a stay order. Neither does the federal habeas corpus statute. See 28 U.S.C. § 2251. Although there is no constitutional right to the appointment of counsel in a death penalty habeas proceeding, this does not preclude a district court from appointing counsel in such a case. *See* 18 U.S.C. § 3006A(a)(2)(B) (United States district court may provide counsel to persons seeking

habeas relief where "the interests of justice so require"); *cf. Murray*, 492 U.S. at 10, n. 5, 109 S.Ct. at 2770-71, n. 5 (State of Virginia not constitutionally required to appoint counsel for a death penalty habeas petitioner, but its courts have statutory authority to do so). If a district court can appoint counsel to represent a death penalty habeas petitioner, surely it can issue a stay of execution when necessary to make the appointment and to allow appointed counsel reasonable time to do his job. Otherwise, the petitioner could be executed before appointed counsel could be found or before that counsel could undertake the task for which he was appointed. The habeas process need not tolerate the possibility of such a perverse absurdity.

We conclude that the underlying purpose of the writ of habeas corpus requires us to view the application for the appointment of counsel to assist in the preparation of a death penalty prisoner's habeas corpus petition as an integral part of the habeas corpus process under section 2251. Viewed in this manner, a habeas corpus proceeding is pending before a federal district court when such an application is filed.

The appellants cite to Rule 3 of the Federal Rules of Civil Procedure which provides that "[a] civil action is commenced by filing a complaint in the court." They argue by analogy that a habeas corpus proceeding under section 2251 cannot "commence" until something which can be interpreted as a petition for habeas corpus relief is filed. We disagree.

While it is true that a habeas corpus proceeding is civil in nature, *see, e.g., Kurtz v. Moffitt*, 115 U.S. 487, 494, 6 S.Ct. 148, 149, 29 L.Ed. 458 (1885), it is equally

true that such a proceeding is dramatically different from any other type of civil action. As the Supreme Court has stated, habeas corpus proceedings are of "'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." *Bounds*, 430 U.S. at 827, 97 S.Ct. 1497 (quoting *Johnson*, 393 U.S. at 485, 89 S.Ct. at 749). As a result, courts are not bound to systematically apply traditional rules governing civil proceedings when to do so would be inconsistent with the overriding purpose of the federal habeas corpus statute. [16]

Appellants' assertion that the Anti-Injunction Act prevents the district court from ordering a stay of Brown's execution is also without merit. The Anti-Injunction Act provides that, "[a] court of the United States may not grant an injunction to stay any proceeding in a State court except as expressly authorized Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The federal habeas corpus statute, however, clearly constitutes an "expressly authorized" exception to the Act. *Mitchum v. Foster*, 407 U.S. 225, 234-35, 92 S.Ct. 2151, 2157-58, 32 L.Ed.2d 705 (1972). As a result, the Anti-Injunction Act does not

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16 Rule 11 of the Rules Governing Section 2254 Cases in United States District Courts, enacted by Congress in 1977, recognizes that the Civil Rules do not necessarily control habeas corpus proceedings. Rather, the Civil Rules, "to the extent that they are not inconsistent with [the Habeas Corpus Rules], may be applied, when appropriate, to [habeas corpus] proceedings . . . ."

The Advisory Committee Notes following Rule 11 further clarify that, "The court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms their discretionary power to use their judgment in promoting the ends of justice." *See also Harris*, 394 U.S. at 299, 89 S.Ct. at 1090.

prevent a district court from staying a state court proceeding pursuant to 28 U.S.C. § 2251.

CONCLUSION

We hold that application for the appointment of counsel to assist a death penalty prisoner in preparing a petition for federal habeas corpus relief, and for a stay of execution, filed pursuant to Central District of California Local Rules 26.8.7(b) and (c), constitutes part of a "habeas corpus proceeding" as set forth in 28 U.S.C. § 2251. As such, the district court had jurisdiction to stay Brown's execution pending the appointment of counsel and the filing of a habeas petition.

AFFIRMED.

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

Dept. 70

Court convened at 1:30 p.m., February 19, 1993, present Hon. Mason L. Fenton, Assigned Judge; Janet May, Deputy Clerk; Richard Shunkey, Bailiff; Heidi Stewart, Reporter; and the following proceedings were had:
C-57572 PEOPLE OF THE STATE OF CALIFORNIA vs. CLAIR, KENNETH
PUBLIC HEARING re Setting Date of Execution
In open court at 1:30 pm. Defendant, not present, represented by counsel, Doug Painter. People represented by counsel, Ronald Cafferty, Deputy District Attorney. Court has read the Commitment (Murder) Judgment of Death, Death Warrant. Whereas, on an automatic appeal to the Supreme Court of the State of California was decided on June 24, 1992, the judgment of the Superior Court imposing the death penalty for the crime of murder in the first degree as alleged in the Information and with the alleged special circumstances was affirmed: Whereas, the judgment and sentence herein has now become final and the Certificate (remittitur) from the Supreme Court of the State of California affirming said judgment has been returned to this court: Whereas, on January 11, 1993, defendant Kenneth Clair's petition for writ of certiorari was denied by the United States Supreme Court: Whereas, there is at this time no stay of execution pending in any court of the State of California, Supreme

Court of the United States or Circuit Court of the United States, it is hereby ordered and adjudged Clair shall suffer the death penalty, and that said penalty shall be inflicted within the walls of the State Prison of San Quentin, California, in the manner and means prescribed by law on the 13th day of April, 1993. The District Attorney is ordered to prepare the Death Warrant. With no further stay of execution pending in any court, Court signs the Death Warrant. ENTERED February 19, 1993.

/s/Mason L. Fenton

MASON L. FENTON, Judge
of the Superior Court
Assigned

ATTEST:
Gary L. Granville, County Clerk
and Clerk of the Superior Court of
the State of California, in and for
the County of Orange.

[SEAL]

BY:
/s/Janet Mary

Deputy County Clerk

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Case No. C-57572
Plaintiff,	)	COMMITTMENT (MURDER);
vs.	)	JUDGMENT OF DEATH; DEATH
KENNETH CLAIR,	)	WARRANT (Penal Code Section 1227)
Defendant.	)	

TO: THE WARDEN OF THE STATE PRISON OF THE STATE OF CALIFORNIA AT SAN QUENTIN:

BE IT REMEMBERED that on the 22nd day of June, 1987, a First Amended Information numbered C-57572 was duly filed against the defendant, KENNETH CLAIR, by the District Attorney of Orange County, charging said defendant in Count I with the murder of LINDA FAYE RODGERS, on November 15, 1984, in violation of Penal Code section 187; Count II with the burglary of an inhabited residence located at 1721 West Wilshire, Santa Ana, on November 15, 1984, in violation of Penal Code section 459; Count III with the burglary of an inhabited residence located at 1721 West Wilshire, Santa Ana, on November 7, 1984, in violation of Penal Code section 459.

And it was further alleged that before the commission of the serious felonies here and above set forth, said KENNETH CLAIR was on or about the 9th day of September, 1976, in the Criminal District Court of

the Parish of Orleans, State of Louisiana, convicted of a serious felony, to wit: armed robbery, in violation of the law and statutes of said state, said offense being a serious felony within the meaning of Penal Code sections 667 and 1192.7(c).

And it was further charged and alleged that the murder was committed under the following special circumstances, to wit:

Number One: That the murder of LINDA FAYE RODGERS was committed by defendant, KENNETH CLAIR, with the intent to kill, while the defendant was engaged in the commission of the crime of burglary in the first degree in violation of Penal Code section 460, within the meaning of Penal Code section 190.2(a)(17)(vii).

Number Two: That the murder of LINDA FAYE RODGERS was committed by the defendant, KENNETH CLAIR, with the intent to kill, while the defendant was engaged in the attempted commission of the crime of rape in violation of Penal Code section 261, within the meaning of Penal Code section 190.2(a)(17)(iii).

Thereafter, defendant was duly arraigned, entered a plea of not guilty to the charges of murder, burglary (both counts), denied the special allegation of conviction of a serious felony, and denied the special circumstances allegations as set forth in the First Amended Information.

Thereafter, on June 23, 1987, the defendant and his attorney being present, the case came on for trial and the selection of the jury was commenced. On July 14, 1987, the trial jury and four alternates were duly and regularly impaneled and sworn to try the above entitled case.

Thereafter, evidence was duly presented to the trial jury as to the issues raised by the defendant's plea of not guilty and his denial of the special circumstances charged in the First Amended Information. Argument was made to the trial jury by the prosecution and defense, and the court instructed the trial jury as to the law applicable to the case.

Thereafter, on July 28, 1987, the trial jury rendered a verdict of guilty as to Count I, murder, and fixed the degree of murder in the first degree.

The jury also found one of the special circumstances allegations to be true; that the murder of LINDA FAYE RODGERS was committed by the defendant, KENNETH CLAIR, with the intent to kill, while the defendant was engaged in the commission of the crime of burglary in the first degree. The jury found the other special circumstances allegation to be not true.

The trial jury also rendered additional verdicts of guilty as to the burglaries charged in counts II and III, and fixed the degree of burglary for both counts in the first degree.

Thereafter, on August 3, 1987, pursuant to Penal Code section 190.3, evidence was presented on behalf of the People and the defendant as to whether the penalty shall be death or life imprisonment without possibility of parole. Thereafter, following arguments of both counsel and instructions of law by the court on this issue, the said trial jury, on August 6, 1987, did return a finding that the penalty shall be death for the murder committed in Count I.

Thereafter, on December 4, 1987, the defendant's motions for new trial and for modification of the verdict

and finding imposing the death penalty were heard by the court and said motions we denied, whereupon on December 4, 1987, the defendant's counsel stated there was no legal cause why sentence should not be pronounced, the court pronounced judgment as follows:

KENNETH CLAIR, it is the judgment and sentence of this Court that for the offense of murder as charged in Count I of the First Amended Information of which you previously, on July 28, 1987, were found guilty, the jury having found the offense of murder to be first degree, and the jury having returned a finding that the special circumstances alleged in the Information under California Penal Code section 190.2(a)(17)(vii), were true; and the jury having previously, to wit, on August 6, 1987, found that the penalty shall be death; and this Court having, on December 4, 1987, denied your motion for new trial and application for modification of verdict and finding imposing the death penalty; it is the order of this Court that you shall suffer the death penalty, said penalty to be inflicted within the walls of the State Prison at San Quentin, California, in the manner prescribed by law and at a time to be fixed by this court in the warrant of execution.

It is further the judgment and sentence of this court that you are sentenced to the midterm of (4) four years for the burglary of November 7, 1984, set forth in Count III of the First Amended information, the court finding no facts in aggravation or mitigation:

It is further the judgment and sentence of this court that you are sentenced to five (5) years for having been previously convicted of a serious felony, to wit: armed

robbery, in violation of the law and statutes of the State of Louisiana, within the meaning of Penal Code section 667 and section 1192.7(c).

Pursuant to Penal Code section 654 the sentence for the burglary of November 15, 1984, as set forth in Count II of the First Amended Information, is hereby stayed during the pendency of any appeal on Count I of the First Amended Information and shall be permanently stayed when the execution of the death sentence on Count I is carried out.

You are remanded to the care, custody and control of the Sheriff of Orange County to be delivered by him to the Warden of the State Penitentiary at San Quentin, California, within ten days from the date hereof, in the usual course of his duties, for the execution of the sentence on the offense of murder in the first degree contained in Count I of the First Amended Information of which you have been found guilty and one of the special circumstances having been found true, to be held by him pending the final determination of your appeal in this matter, which is automatic, and said sentence to be executed upon final determination of said appeal, and you are to be held by him during said period of time, until further order of this Court. It is so ordered.

On May 7, 1992, in the case of the People v. Kenneth Clair, case number S004789, Crim. No. 26423, the Supreme Court of California issued its opinion affirming the judgment of the Superior Court in its entirety, including that portion of the judgment imposing the death penalty for the crime of murder in the first

degree with the special circumstances allegation found to be true by the trial jury.

On June 24, 1992, the Supreme Court of California denied defendant KENNETH CLAIR'S petition for re-hearing and issued its remittitur.

The judgment and sentence have now become final and the remittitur of the Supreme Court of California has been returned to and filed in this court.

On January 11, 1993, defendant Kenneth Clair's petition for writ of certiorari was denied by the United States Supreme Court.

There is at this time no stay of execution pending in any court of the State of California, Supreme Court of the United States, Circuit Court of the United States or District Court of the United States.

IT IS HEREBY ORDERED AND ADJUDGED that for the crime of murder in the first degree with special circumstances, the defendant KENNETH CLAIR, shall suffer the death penalty and that said penalty be inflicted within the walls of the State Prison at San Quentin, California, in the manner and means prescribed by law on the 13th day of April, 1993.

FURTHER, this is to command you, the Warden of the State Prison of the State of California, at San Quentin, California, to hold in your custody the said KENNETH CLAIR, and to carry into effect the judgment of this court by putting to death the said KENNETH CLAIR in the manner and means prescribed by law on the 13th day of April, 1993.

IN WITNESS WHEREOF, I have set my hand as Judge Assigned of the Superior Court, and have caused the

seal of said court to be affixed hereto this 19th day of February, 1993.

/s/Mason L. Fenton

JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ORANGE, ON ASSIGNMENT FROM THE JUDICIAL COUNCIL, SAID ASSIGNMENT BEING SIGNED BY THE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

ATTEST:

Gary L. Granville, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Orange [SEAL]

BY: /s/Janet Mary

Deputy County Clerk

CALIFORNIA DEATH PENALTY CASES INVOLVING PRE-PETITION STAYS OF EXECUTION

Petitioner's Last Name	*U.S.D.C. Case No.*	*Jud. Dist.*	*Date of First Stay*	*Date HC Petition filed*
Odle	CV88-4280-CAL	ND	10-26-88	05-31-89
Howard, G.L.	CV88-7240-WJR	CD	12-02-88	09-25-89
Caro	CV89-1400-GPV	ND	04-25-89	04-27-90
McLain	CV89-3061-JGD	CD	05-18-89	12-28-90
Coleman, R.	CV89-1906-RFP	ND	06-02-89	01-19-90
Karis	CV89-527-LKK	ED	06-02-89	03-26-90
Rich	CV89-0823-EJG	ND	06-08-89	09-18-90

Thompson, T.	CV89-3630-RAG	CD	06-20-89	01-16-90
Jennings, M.	CV89-1360-WAI	ND	11-07-89	04-17-91
Siripongs	CV89-6530-WDK	CD	11-09-89	07-06-90
Miranda	CV89-7130-RJK	CD	12-15-89	06-15-90
Brown, J.G.	CV90-2815-AWT	CD	06-01-90	11-06-91
Coleman, C.	CV90-1588-VRW	ND	06-04-90	07-15-91
Bean	CV90-0648-EJG	ED	06-08-90	07-18-91
Hamilton, M.A.	CV90-363-OWW	ED	06-18-90	12-03-91
Carrera	CV90-478-EDP	ED	08-06-90	08-26-91

Kimble	CV90-4826-SVW	CD	09-12-90	09-17-91
Ghent	CV90-3275-JW	ND	10-01-90	06-18-92
Johnson, J.W.	CV90-3219-DLJ	ND	01-07-91	NYF
Hunter	CV90-6983-JG	ND	11-27-90	NYF
Thompson, R.J.	CV90-6605-JMI	CD	12-05-90	03-01-93
Fields	CV92-0465-RG	CD	01-23-91	05-25-93
Morales	CV91-0682-DT	CD	02-08-91	07-28-92
Burton	CV91-1652-AWT	CD	03-27-91	05-29-92
Turner	CV91-153-REC	ED	04-02-91	03-08-93

Bell	CV91-1115-FMS	ND	04-12-91	06-12-92
Boyde	CV91-2522-WDK	CD	05-13-91	01-18-94
Miller, D.	CV91-2652-KN	CD	05-16-91	NYF
Gordon	CV91-882-LKK	ED	07-08-91	10-23-91
Ramirez	CV91-3802-CBM	CD	07-18-91	04-29-93
Lang	CV91-4061-JMI	CD	07-30-91	04-27-93
Jackson, M.A.	CV91-6983-JG	CD	08-08-91	03-15-93
Douglas	CV91-3055-RSLW	CD	06-13-91	11-18-92
Robbins	CV91-4768-TJH	CD	09-09-91	NYF

Mattson	CV91-5453-WJR	CD	10-09-91	NYF
Stankewitz	CV91-616-OWW	ED	11-15-91	NYF
Frank	CV91-6287-AHS	CD	11-22-91	12-10-93
Jennings, W.	CV91-684-OWW	ED	12-24-91	NYF
Anderson	CV92-0488-JGD	CD	01-24-92	NYF
Gallego	CV92-0653-SBA	ND	02-04-92	NYF
Pensinger	CV92-1928-RMT	CD	03-30-92	NYF
Cooper	CV92-0427-G	SD	03-26-92	NYF
Morris	CV92-0483-EJG	ED	03-30-92	06-15-93

Deere	CV92-1684-GLT	CD	04-01-92	05-17-93
Hayes	CV92-0603-DFL	ED	04-21-92	04-14-93
Taylor	CV92-1627-MHP	ND	05-04-92	NYF
Cox	CV92-3370-CBM	CD	06-04-92	12-10-93
Sanders	CV92-5471-REC	ED	07-14-92	12-17-93
Mickle	CV92-2951-TEH	ND	07-30-92	NYF
Kelly	CV92-5420-TJH	CD	09-08-92	NYF
Nicolaus	CV92-3796-BAC	ND	09-17-92	NYF
Beardslee	CV92-2399-SBA	ND	10-01-92	NYF

Sully	CV92-0829-BAC	ND	10-09-92	NYF
Haskett	CV92-6192-HLH	CD	10-16-92	NYF
Frierson	CV92-6251-RG	CD	10-20-92	NYF
Wharton	CV92-3419-KN	CD	10-21-92	NYF
Allison	CV92-6404-JGD	CD	10-27-92	NYF
Wright	CV92-6918-JMI	CD	11-24-92	NYF
Adcox	CV92-5830-OWW	ED	12-02-92	NYF
Price	CV93-2071-JW	ND	01-25-93	NYF
Mickey	CV93-0243-RMW	ND	01-27-93	NYF

Roberts	CV93-0254-EJG	ED	02-05-93	NYF
Ashmus	CV93-0594-TEH	ND	02-17-93	NYF
Thomas	CV93-0616-MHT	ND	02-19-93	NYF
Clair	CV93-1133-GLT	CD	03-02-93	NYF
Webster	CV93-0306-LKK	ED	03-02-93	NYF
Mincey	CV93-2554-MRP	CD	05-03-93	NYF
Riley	CV93-2071-JW	ND	06-01-93	NYF
Kelly	CV93-2951-TJH	CD	06-04-93	NYF
Pride	CV93-506-GEB	ED	06-10-93	NYF

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Supreme Court, U.S.
FILED
APR 14 1994
OFFICE OF THE CLERK

No. 93-1454 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

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ARTHUR CALDERON, WARDEN
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,

Petitioners,

v.

KENNETH CLAIR,

Respondent.

-------- * --------

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

-------- * --------

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Kenneth Clair

April 14, 1994

22 pgs

QUESTION PRESENTED

Does a federal district court possess jurisdiction to grant a stay of execution of a state prisoner pending appointment of counsel to assist the prisoner in preparing and filing a habeas corpus petition?

LIST OF PARTIES

The parties to the proceedings below were Kenneth Clair, an inmate under sentence of death at California State Prison, San Quentin, California, and Daniel Vasquez, then-warden of California State Prison at San Quentin.

The respondent before this Court is Kenneth Clair.

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No. 93-1454

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

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ARTHUR CALDERON, WARDEN
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DANIEL E. LUNGREN,
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Petitioners,

v.

KENNETH CLAIR,

Respondent.

-------- * --------

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

-------- * --------

Respondent, Kenneth Clair, hereby responds to the Petition for Writ of Certiorari (the "Petition") filed by petitioners Arthur Calderon, Warden, California State Prison at San Quentin, and Daniel E. Lungren, Attorney General of the State of California ("the State"), seeking review of the order of the United States Court of Appeals for the Ninth Circuit filed on December 30, 1993 finding that the State's appeals from orders staying Mr. Clair's execution were moot.

ADDITIONAL STATUTES AND RULES INVOLVED

Title 21 United States Code, Section 848 (q)(4)(B), provides:

> "In any post conviction proceeding under Section 2254 or Section 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)."

Title 28 United States Code, Section 1651(a), the "All Writs Act," provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Title 28 United States Code, Section 2071, provides:

> "(a) The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be

consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title."

Federal Rules of Civil Procedure, Rule 83, provides:

"Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."

Civil Rule 26.8.7(c) of the United States District Court for the Central District of California (hereinafter "Local Rules") provides:

"(c) Temporary Stay for Preparation of the Petition: Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the district court shall issue a temporary stay of execution unless no nonfrivolous issues are presented. The temporary stay will remain in effect for

one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition. The temporary stay may be extended by the court upon a subsequent showing of good cause."

STATEMENT OF THE CASE

Respondent, Kenneth Clair, an indigent, is currently under sentence of death and confined at San Quentin State Prison in California. His conviction and sentence of death were affirmed by the California Supreme Court on automatic appeal, People v. Clair, 2 Cal.4th 627, 7 Cal.Rptr.2d 564 (1992), as was his petition for habeas corpus to the same court. Respondent's Petition for Writ of Certiorari to the United States Supreme Court was also denied. Mr. Clair's unsuccessful direct appeal as well as his state petition for habeas corpus alleged in detail multiple federal constitutional violations, as did his petition to this Court.

On February 19, 1993, the Orange County Superior Court for the State of California set April 13, 1993, as the date for execution of the judgment of death. On February 22, 1993, in accordance with Local Rule 26.8.7(b), and with the assistance of the California Appellate Project, respondent filed in pro per a "Request for Appointment of Counsel in Death Sentence Case and For Stay of Execution of Death Sentence" with the United States District Court for the Central District of California and

requested a 45-day stay of execution to permit appointment of counsel.

A. The First Appeal

On March 1, 1993, United States District Judge Gary L. Taylor granted Mr. Clair's request for a stay of the execution, extending the date to and including May 28, 1993. Judge Taylor forwarded Mr. Clair's request for the appointment of counsel to the Attorney Selection Board for the Central District of California. See, Local Rule 26.8.4(a). On March 11, 1993, the State filed its notice of appeal. The State's Petition relates to that appeal. The State seeks permission to immediately execute Mr. Clair without any federal court considering the merits of Mr. Clair's federal claims.

Prior to the expiration of the execution stay, in May 1993, Michael Millman, director of the California Appellate Project and a member of the Attorney Selection Board, requested an additional 45-day stay of execution to allow the Selection Board the necessary time to find federal habeas counsel for Mr. Clair. Mr. Millman represented to the District Court that the request was made because qualified federal habeas counsel had not yet been located. Judge Taylor granted the request. The State did not appeal, moving instead to vacate the May stay of execution.

B. Appointment of Federal Habeas Counsel

On July 22, 1993, Henry H. Rossbacher was appointed to represent Mr. Clair in his federal habeas corpus proceeding.

On July 23, 1993, Judge Taylor denied the California Attorney General's motion to vacate the May stay order in an extensive written opinion. See United States District Court for the Central District of California Order filed on July 23, 1993 (reported at 827 F.Supp. 1465) (see Appendix A, pp. 9a-14a).

On October 6, 1993, counsel for petitioner, in compliance with Local Rule 26.8.7(c), filed the Specification of Nonfrivolous Issues to be Raised in Petition for Writ of Habeas Corpus. The Specification itemized thirty-one (31) separate issues (with sub-parts).

Based on the filing of the Specification and pursuant to the same Local Rule, Mr. Clair's stay of execution was continued by Judge Taylor to and including February 11, 1993. The State did not appeal this order. The district court subsequently set the filing date for the petition at September 15, 1994 and extended the stay of execution through September 19, 1994. The State has also not appealed this order. This is the stay which is currently in effect.

C. The State's Second Appeal

The State of California then appealed from the July 23, 1993 order denying the State's motion to vacate the stay of execution. In essence, the State again asked permission to immediately

execute Mr. Clair, despite the appointment of counsel. That appeal was filed was filed August 17, 1993.

D. The Court of Appeals Decision

Petitioner filed a motion to dismiss both appeals as moot, citing the frivolousness of the State's position and pointing particularly to the appointment of counsel and the filing of the Specification of Nonfrivolous Issues on October 6, 1993. On December 30, 1993, the United States Court of Appeals dismissed the State's appeals as moot. This writ followed.

REASONS FOR DENYING THE PETITION

I. SUMMARY OF ARGUMENT

The issues raised by the State are moot. The stays of execution at issue have expired, permanent federal habeas counsel has been appointed and a Statement of Nonfrivolous Issues alleging multiple federal constitutional violations is before the District Court. Moreover, subsequent stays have been granted which have not been appealed. Even if, arguendo, the issue is "capable of repetition," it is not "evading review." The State can raise the issue in cases where federal habeas counsel have not been appointed and no Specification of Nonfrivolous Issues is before the Court.

The Petition should also be denied because Judge Taylor and the Ninth Circuit have correctly decided the issue. The Courts' determinations are compelled by this Court's decision in

McCleskey v. Zant, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), in which this Court held that a federal habeas petitioner must assert all possible constitutional issues in an initial petition or risk losing potentially viable claims. Partial, protective writs are not merely discouraged but actually penalized by that decision. Central District Local Rule 26.8.7 ensures that the petitioner has a meaningful opportunity to comply with the mandate of McCleskey.

The State here refers to Demosthenes v. Baal, 495 U.S. 731, 737, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990), for the principal that before granting a stay, federal courts must make certain that an adequate basis exists for the exercise of federal power, claiming that only a petition can discharge this obligation. Even if that is a correct reading of Demosthenes, which petitioner disputes, the requirement of an adequate basis has been met in a number of different ways. First, the record reflects that petitioner raised federal constitutional issues both in his direct state appeal and state habeas corpus petition as well as his petition to this Court. Second, of course, petitioner has filed with the District Court a seventeen-page Statement itemizing no less than thirty-one separate federal habeas issues (with sub-parts). The State does not challenge the adequacy of these showings, only their form. 28 U.S.C § 2251 provides an adequate basis for the district court's jurisdiction, and even if it did not, the All Writs Act (28 U.S.C. § 1651(a)) provides an adequate independent jurisdictional basis.

The Petition should also be denied as the issues raised are presently being decided by the Court in McFarland v. Collins, United States Supreme Court #93-6497, which was argued on March 29, 1994.

The Petition should be denied with respect to the second issue raised by the State, as the State did not challenge the Central District's Local Rules pertaining to habeas corpus cases, and, thus, failed to preserve this issue on appeal. It is further anomalous for the State Attorney General to be seeking Supreme Court review of a district court rule when the Attorney General was a member of the task force that helped to formulate that rule.

Finally, the third issue presented in the Petition concerning the execution stay requested by a member of the Central District's Attorney Selection Board was no more than a factual issue resolved by the district court, and in any event, not important enough to merit review by this Court.

II. THE NINTH CIRCUIT DECISION IS CORRECT AS THE ISSUES RAISED IN PETITIONERS' APPEAL ARE MOOT

The Petition should be denied because the Ninth Circuit fully considered and correctly decided that the issues raised on appeal by the State were moot. The stays of execution at issue have expired, permanent counsel has been appointed, a seventeen-page Statement of Nonfrivolous Issues alleging thirty-one (with sub-parts) separate federal constitutional violations is before

the district court, and subsequent stays, have been sought by counsel and granted. Even if the issue arguably is "capable or repetition," it is not "evading review." There exists, therefore, no justiciable case or controversy.

III. THE QUESTIONS RAISED BY PETITIONERS ARE PRESENTLY BEFORE THE COURT IN McFARLAND v. COLLINS

The Petition\should also be denied as the issues presented therein are effectively before the Court in Franklin Basil McFarland v. James A. Collins, United States Supreme Court #93-6497. On March 29, 1994, this Court heard oral argument in the McFarland case.

IV. PETITIONERS' ARGUMENT REGARDING THE DISTRICT COURT'S JURISDICTION TO GRANT PRE-PETITION STAYS OF EXECUTION IS WITHOUT MERIT

The Petition should also be denied because Petitioners' argument that the district court has no jurisdiction to stay an execution prior to the filing of the federal petition is without merit. Petitioners argue that only upon the filing of a petition for a writ of habeas corpus is a habeas corpus "proceeding" initiated, triggering jurisdiction of the district court to stay an execution. This position is not tenable in light of the entitlement to counsel in federal habeas proceedings. The filing of an application for appointment of counsel commences a federal habeas proceeding under 28 U.S.C. § 2254, giving the federal

courts authority to appoint counsel under 28 U.S.C. § 848 (q)(4)(B) and stay executions under 28 U.S.C. § 2251.

Further authority to appoint counsel and stay an execution is found under the All Writs Act, 28 U.S.C. § 1651(a). The All Writs Act authorizes stays of execution where a stay is necessary to preserve future habeas jurisdiction. This Court regards the All Writs Act as a principal source of its own power to stay an execution to enable federal review. See, e.g., Lenhard v. Wolff, 443 U.S. 1306 (1979) (Rehnquist, J., in chambers); see generally Annot., Stay of Execution of Death Sentence by Supreme Court or Justice Thereof, 78 L.Ed.2d 914, 917-918 (1985). Presumably even the State would concede that its killing of Mr. Clair would oust the district court of jurisdiction.

Further, the Anti-Injunction Act, 28 U.S.C. § 2283, facilitates, rather than prohibits, the exercise of federal judicial power. The equitable underpinnings of § 2283 permitted the stay of the state court judgment for any of three reasons: (1) The stay was expressly authorized by 28 U.S.C. § 2251 when Mr. Clair filed his pro se application and thus commenced his federal habeas proceeding; (2) the stay was authorized by § 848(q), in order to effectuate its provisions, to have been "expressly authorized" by Congress; and (3) the stay was authorized under the All Writs Act, and stays properly entered pursuant to that act are permitted under § 2283.

V. THE CENTRAL DISTRICT'S LOCAL RULES ON THE ORDERLY ADMINISTRATION OF HABEAS CORPUS CASES CORRECTLY FOLLOW THE DICTATES OF FEDERAL LAW

The Petition should also be denied as the Central District's Local Rules, which Petitioners helped formulate, properly set forth a framework in which to apply federal statutes involving habeas corpus proceedings. The Local Rules are no more than an exercise of the District Court's authority to regulate proceedings before it provided for by the Federal Rules of Civil Procedure, Rule 83.

Petitioners do not deny the stays were properly issued under the Local Rules, but instead argue the Local Rules themselves are invalid. Under the scenario urged by Petitioners, an indigent inmate would be required to file a habeas corpus petition in order to obtain a stay for the appointment of counsel to assist in the filing of a habeas corpus petition. Such a paradoxical procedure would result in capital defendants being left without counsel to assist them in seeking relief from the federal courts, contrary to the intent of 21 U.S.C. § 848(q).

VI. PETITIONERS' CLAIM REGARDING THE CENTRAL DISTRICT RULES WAS NOT RAISED OR PRESERVED BELOW AND WAS WAIVED

The Petition should also be denied as the State failed to raise or preserve in either of its two appeals to the Ninth Circuit its claim that Local Rule 26.8.7 violates the Separation of Powers Doctrine.

VII. MICHAEL MILLMAN'S APPLICATION FOR A STAY OF EXECUTION PENDING APPOINTMENT OF COUNSEL INVOLVED A FACTUAL ISSUE WHICH WAS RESOLVED BY THE DISTRICT COURT, AND IS NOT IMPORTANT ENOUGH TO WARRANT REVIEW

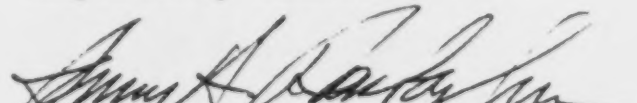
Finally, the Petition should properly be denied as there is no justiciable case or controversy with respect to the State's claim that a member of the Attorney Selection Board improperly sought a continuation of the stay of execution pending the identification of counsel. After analyzing the unique facts and circumstances surrounding Michael Millman, Esq.'s application for a stay, filed subsequent to the application made by Mr. Clair, the district court was satisfied that Mr. Millman was acting by and on behalf of Mr. Clair. In his order denying the motion to vacate the stay, Judge Taylor found that Mr. Millman's request on behalf of Mr. Clair (who clearly had no intention of abandoning his federal habeas action) was proper under the circumstances in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: April 14, 1994

Respectfully submitted,



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April 14, 1994

5045.002

Clerk of the Court
UNITED STATES SUPREME COURT
One 1st Street, N.W.
Washington, DC 20543

Re: CALDERON and LUNGREN v. KENNETH CLAIR
Case No. 93-1454

Dear Sir or Madam:

Enclosed for filing please find the original and ten (10) copies of the following documents:

1. RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, and

2. BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Please conform the attached face sheets and return them in the self-addressed, stamped envelope provided.

Thank you for your anticipated courtesy. Should you have any questions, please do no hesitate to call either Mr. Rossbacher or me collect.

Sincerely,

ROSSBACHER & ASSOCIATES

Linda L. Griffis

Linda L. Griffis

LLG:no

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PROOF OF SERVICE
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STATE OF CALIFORNIA)
)ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Union Bank Plaza, 24th Floor, 445 South Figueroa Street, Los Angeles, California 90071.

On April 14, 1994, I served the foregoing document described as **BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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Cathy Catterson, Clerk
U.S. NINTH CIRCUIT
COURT OF APPEALS
P.O. Box 193939
San Francisco, CA 94119-3939

Hon. Gary L. Taylor
United States District Court
751 W. Santa Ana Boulevard
Santa Ana, CA 92701-4793

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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Nancy R. Oberlin

NANCY R. OBERLIN

no\5045.002\oppcert

CERTIFICATE OF SERVICE BY MAIL

Attorney:

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State of California

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Attorneys for Petitioner

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No. 93-1454
October Term, 1993

Arthur Calderon, Warden, and
Daniel E. Lungren, Attorney
General of California,
Petitioners

v.

Kenneth Clair,
Respondent

I, the undersigned, hereby declare that I am a citizen of the United States, that I am 18 years of age or older, that I am employed in the County of San Diego, State of California, in which county the below stated mailing occurred, that I am not a party to the subject cause, and that my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

I further declare that I have caused the within

REPLY BRIEF

to be served on:

William K. Sutter, Clerk, Supreme Court of the United States, Washington, DC 20543, an original and 40 copies;

and by placing one or more copies in a separate envelope addressed to each addressee named below which envelope was then sealed and, with postage prepaid, deposited in the United States mail by me at San Diego,California, on the 22d day of April, 1994:

Cathy Catterson, Clerk
U.S. Court of Appeals
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

U.S. District Court
Hon. G.L. Taylor
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I further declare that there is delivery service by the United States Postal Service and/or private courier service at each place so addressed, or regular communication by the United States Postal Service and/or private courier service between the place of mailing and each place so addressed.

I hereby further declare, under penalty of perjury, that the foregoing is true and correct.

Dated at San Diego, California, this the 22d day of April, 1994.

CARL H. HORST,
Deputy Attorney General

No. 93-1454

Supreme Court, U.S.
FILED
APR 25 1994
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In the
Supreme Court of the United States
October Term, 1993

ARTHUR CALDERON, WARDEN
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Petitioner,

v.

KENNETH CLAIR,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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10 pp

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No. 93-1454

In the

Supreme Court of the United States

October Term, 1993

ARTHUR CALDERON, WARDEN
and
DANIEL E. LUNGREN,
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Petitioner,

v.

KENNETH CLAIR,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

Petitioners, Arthur Calderon, Warden, California State Prison at San Quentin, California, and Daniel E. Lungren, Attorney General of the State of California, hereby submit the following reply to the Brief In Opposition.

I.

THE ISSUES RAISED IN THE PETITION ARE NOT MOOT.

Respondent maintains that, because the stays of execution have expired and federal habeas counsel has been appointed, the issues raised in the petition are moot.

Respondent neglects the fact that, as of this date, no federal habeas corpus petition has been filed, nor is it expected that one will be filed prior to September, 1994. More importantly, as demonstrated in the petition, the local rule based procedure, which results in a pre-petition stay of execution, is easily capable of repetition and thus the questions presented have not lost their character as a present live controversy.

II.

THE QUESTIONS PRESENTED IN THIS CASE ARE NOT PRESENTLY BEFORE THE COURT IN *MCFARLAND*.

Respondent maintains the petition should be denied as the issues presented are effectively before this Court in *McFarland v. Collins*, No. 93-6497.

Respondent's assertion is essentially incorrect. This case presents two issues not present in *McFarland*. Most significant is the fact that, in this case, unlike *McFarland*, the pre-petition stay of execution is based on a local rule of court. As discussed in the petition, the existence, nature and application of the local rules implicated in this case

presents the question whether such rules conflict with the separation of powers doctrine.

Moreover, unlike *McFarland*, this case involves the question whether the district court may disregard the justiciable case or controversy requirement by permitting an attorney who had "no legal authority to act on [respondent's] behalf" to seek an extention of a stay of execution based on the rationale that it was "within the [District] Court's] discretion to disregard this defect. [Citation omitted]." *Clair v. Vazquez*, 827 F. Supp. 1465, 1466-1467 (S.D. Ca. 1993).

III.

THE ENTITLEMENT TO APPOINTED COUNSEL TO PRESENT A FEDERAL HABEAS CHALLENGE TO A STATE COURT JUDGMENT DOES NOT CONFER JURISDICTION TO GRANT A PRE-PETITION STAY OF EXECUTION

Respondent essentially maintains that the right to appointed counsel afforded by 21 U.S.C. § 848(q)(4)(B) confers jurisdiction in the district court to grant a pre-petition stay of execution.

The question presented essentially is one of statutory interpreptation. Reliance on the provisions of 21 U.S.C. § 848(q)(4)(B) is not particularly helpful as the very language of this statutory provisions indicates that it is intended to augment, not supplant the federal habeas corpus statute.

The simple fact remains there is no constitutional right to counsel in federal or state post-conviction

proceedings. *See Pennsylvania v. Finley*, 481 U.S. 551, 557, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987); *see also McCleskey v. Zant*, 499 U.S. ___, 111 S. Ct. 1454, 113 L. Ed. 2d 517, 545 (1991); *Coleman v. Thompson*, 501 U.S. ___, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991); *and Murray v. Giarratano*, 492 U.S. 1, 10, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) [opinion of Rehnquist, C.J. observing that "the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in non-capital cases"]. To hold that it is necessary to give effect to the statutory right to counsel by permitting a stay of execution based solely on a request for counsel essentially creates a constitutional right to counsel. If Congress intended to require that legal assistance be provided for all death row inmates, it could have chosen to do so.[1/] It does not defy common sense to say that Congress intended a convicted criminal to use his own resources to seek a federal habeas review of his state conviction.

Permitting a pre-petition stay is a clear example of placing the cart before the horse. A convicted criminal is entitled to seek federal habeas corpus review of his state judgment of conviction. To obtain appointment of counsel and a stay of execution, he must at least present a petition which sets forth ultimate facts indicating he is in custody in violation of the federal Constitution or laws or treaties of the United States. *Estelle v. McQuire*, ___ U.S. ___, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). It does not render

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[1]. As Justice Ginsburg observed during oral argument in *McFarland*, "[I]t would be very easy for Congress to say, anyone who desires to file a habeas petition is entitled to a lawyer for that purpose." Trans. oral argument proceedings held on March 29, 1994.

section 848(q)(4)(B) a "dead letter" by requiring presentation of a minimally sufficient petition. Rather, such a requirement reflects a proper interpretation of the statutory requirement concerning appointment of counsel by reconciling the two statutes in an harmonious manner. Reasoning to the contrary is predicated on the faulty premise that federal habeas corpus review is indispensable to due process of law. It is not!

The State of California is entitled to exercise "its sovereign power to enforce the criminal law . . ." (*In re Blodgett*, 502 U.S. ___, 112 S. Ct. 674, 116 L. Ed. 2d 669, 674 (1992)); an interest which this Court found of great weight in *McCleskey*, when discussing the importance of finality in the context of federal habeas proceedings. *McCleskey*, 113 L. Ed. 2d at 544-546.

While it may be less convenient for the court to require the filing of a petition before appointing counsel and granting a stay, inconvience does not justify a strained statutory interpretation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 22, 1994

Respectfully submitted,

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Attorney General of California
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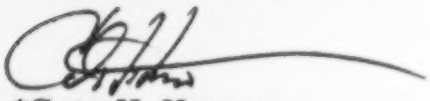

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